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In The Supreme Court of the United States

ILLINOIS TOOL WORKS INC.
AND TRIDENT, INC.,

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Petitioners,

v.

INDEPENDENT INK, INC.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

BRIEF OF NATIONAL ASSOCIATION OF THEATRE OWNERS AND VIDEO SOFTWARE DEALERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

As trade associations representing businesses who sell, rent and exhibit copyrighted audiovisual works, and who have long enjoyed freedom to decide the amount of space, number of screens, or investment dollars to dedicate to any given copyrighted work, National Association of Theatre Owners, Inc. (hereafter "NATO") and Video Software Dealers Association, Inc. (hereafter "VSDA") respectfully submit this brief as *amici curiae* in accordance with Supreme Court Rule 37.[1]

NATO is the largest exhibition trade organization in the world, representing over 500 members with nearly 28,000 movie screens in all 50 states, and additional cinemas in more than 40 countries worldwide. NATO's membership includes the largest cinema chains in the world, as well as hundreds of small, independent theaters. Most of these small theaters have only one or two screens, and possess neither the market position to resist an effort at copyright leveraging by product suppliers, nor the resources to mount a legal challenge to such practices, should the legal environment regarding such practices become less clear.

VSDA's members are retailers and distributors of "home videos" – lawfully made copies of motion pictures and other audiovisual works – offered for rental and sale to the public (both new and used) in thousands of video stores, from small single-store retailers to major chains

[1] The parties have consented to the filing of this brief. Copies of their respective letters of consent are submitted herewith. Counsel for a party did not author this brief in whole or in part. No person or entity other than the *Amici Curiae*, their members, or their counsel made a monetary contribution to the preparation and submission of this brief.

and mass merchants, independent of copyright owner control. Their efforts gave rise to the $24 billion home video entertainment industry, built upon independent aggregation of copyrighted works from myriad authors, and presented to the public in a manner intended to most closely match the viewing preferences of each retailer's customer base.

The members of NATO and VSDA compete vigorously in the delivery of lawful copies and lawful public performances of copyrighted audiovisual works. Their businesses are built on understanding the local and individualized demand any given work generates. Success of a movie is measured first by its ranking in box office revenue over the opening weekend, then by total first run box office revenue, and next by home video market revenue. But millions of consumers also seek out individual titles that are more obscure – titles that may only be shown in specialized theaters or marketed directly to video stores without a theatrical run. Works in foreign languages, independent films, and niche products including "how to" videos or local productions with little or no economic viability all vie for the attention of a video retailer or movie theater that may deem the work capable of satisfying a significant portion of its customer base. Because their competitive success depends so heavily on their ability to provide the right mix of product supply to meet consumer demand, any power claimed by the owner of one copyright to dictate terms impacting the flexibility to license or buy any other copyrighted works hinders their freedom to enhance competition, both locally and nationally.

SUMMARY OF ARGUMENT

Amici Curiae do not address the single issue before the Court: whether the presumption of economic power should be maintained in *patent* tying cases. Rather, the brief opposes the suggestion that this Court should relax the presumption of economic power in *copyright* tying cases as well.

Amici Curiae begin by explaining why copyright presents no justiciable issue in this proceeding – there being no parties who put their copyrights at issue, no factual record to sharpen the adjudication of any copyright issue, no actual adjudication of any copyright issue, no intermediate appellate holding addressing copyright law, no signal from this Court in granting certiorari that its inquiry into a patent case would extend to the copyright domain – and indeed, not even a threshold Article III Case or Controversy as to copyright. This Court has never altered both patent and copyright law in tandem – nor ever treated the two domains as interchangeable. When this Court notes similarities – or "borrows" from one domain – it does so carefully and deliberately, and adjudicates only in the domain before it.

Next, the brief examines why criticism of the presumption of economic power in patent tying cases is wholly inapposite to copyright tying cases. Differences in consumer behavior with respect to patented goods and copyrighted works, differences in substitutability and cross-elasticity, and differences in the scope of the two bodies of exclusive rights, to name a few, underscore the fact that the economic theory purporting to justify some patent tying does not translate meaningfully to copyright tying.

In the third section, *Amici Curiae* highlight fundamental public policy differences between these two bodies of law – patent law, which intends to foster the invention of competitive new products with an assumption that each improvement may supplant or *substitute* for the lesser one, and copyright law, which is premised on ensuring the widest possible *cumulative* dissemination of and access to works of authorship. To put it simply, *Amici Curiae* explain how patent tying law assumes that a buyer will choose product A *or* product B, and that public policy is served when the better of the two wins out *to the exclusion of the lesser*, whereas copyright tying law assumes that a buyer may choose product A *and* product B, and that public policy is served when the better work can be selected *in addition to the lesser*. Thus, foreclosure of a patent-tied product might arguably result in a superior consumer "package" in some cases, but foreclosure of a work of authorship from the vast pool of expressive material will always be injurious.

Accordingly, if this Court chooses to limit the scope of the presumption in patent tying cases, it should make clear that nothing in its Opinion should be read to imply any similar relaxation of the presumption in copyright tying cases.

ARGUMENT

I. No Copyright Issue Is Properly Justiciable In This Patent Proceeding

The presumption of market power in tying cases developed separately in the patent and copyright domains. It converged in this Court's articulation of the presumption in

a copyright case, *United States v. Loew's, Inc.*, 371 U.S. 38 (1962). Beyond that coincidence of doctrinal convergence in a copyright case, this case is entirely a patent case. The products at issue are patented. The injury alleged, as a basis for threshold standing, concerns patent tying. The factual record developed in the trial court focused entirely on patents. The economic theories supporting and challenging the presumption overwhelmingly address patents. The trial court adjudicated a patent case. The court of appeals adjudicated a patent case (including denial of an interlocutory appeal) and referenced only patents in its holding. And finally, this Court granted certiorari on the basis of an expressly framed *patent* law question. Indeed, the question presented used the word "patent" three times (and "copyright," zero).

Whence, then, the copyright issue? The *amici curiae* brief submitted by a group of leading associations representing various copyright industries urges this Court to apply any relaxation of the presumption of market power under patent law to copyright law as well.[2] The logic of their suggestion treats copyright jurisprudence as a subset of patent jurisprudence, such that a holding in patent law should apply *a fortiori* to copyright law, despite the absence of any factual record or adjudication of a copyright issue. We respectfully disagree, and urge the Court to adjudicate only the case before it.

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[2] Brief of *Amici Curiae* Motion Picture Ass'n of America, Inc., Ass'n of American Publishers, American Society of Media Photographers, Inc., Business Software Alliance, Entertainment Software Ass'n, Independent Film & Television Alliance, National Football League, and Recording Industry Ass'n of America, hereafter referred to as the "Copyright Industry *Amici*."

A. Adjudicating a copyright issue in this patent case would contravene both congressional and judicial treatment of these two distinct domains

Patents, copyrights, trademarks and trade secrets enjoy the convenient generic denomination of "intellectual property," much as assault and negligent entrustment enjoy the generic denomination of "torts." But the United States Code does not establish any body of law known as "intellectual property." The Code does not use the term "intellectual property" at all with reference to statutory rights and obligations, but solely to describe documents, such as treaties or acts of Congress, containing the term, or to the authority or jurisdiction of administrative offices. To the contrary, Congress codified the laws governing patents, copyrights and trademarks in entirely separate titles, and made scarce provision for trade secrets. Moreover, Congress placed the administration of patents within the jurisdiction of the Department of Commerce's Patent and Trademark Office, 35 U.S.C. § 2,[3] and entrusted the

[3] The only references to "copyrights" in Title 35 appear in Section 2, where the term is used to specifically demark the boundaries touching copyright law and to require cooperation with the Register of Copyrights. For example, Section 2(a) confers general powers solely over the issuance of patents and registration of trademarks, and Section 2(b) grants a number of specific powers to the United States Patent and Trademark Office, including advising the President and others on matters pertaining to "intellectual property," but Section 2(c)(3) states: "Nothing in subsection (b) shall derogate from the duties and functions of the Register of Copyrights or otherwise alter current authorities relating to copyright matters."

administration of copyrights to the Librarian of Congress, 17 U.S.C. § 701.[4]

Congress has not made a single amendment applicable, categorically, to all of the discrete domains within "intellectual property law." Congress instead always amends each body of law separately, and on its own merits, even where some of the same principles might arguably have warranted common treatment. For example, in passing the 1988 Patent Misuse Reform Act, Pub. L. No. 100-703, 102 Stat. 4676 (1988) (codified at 35 U.S.C. § 271(d)(4) & (5)), Congress removed the presumption of market power from the defense of *patent* misuse in tying cases, but left untouched the corollary defense of *copyright* misuse – a doctrine that has continued to develop unhindered by the patent revisions. *See, e.g., Lasercomb America, Inc. v. Reynolds*, 911 F.2d 970, 976 (4th Cir. 1990) (finding copyright misuse). Conversely, when Congress prohibited the circumvention of technologies that protect against infringing access to a copyrighted work, 17 U.S.C. § 1201 *et seq.*, it took no similar step to prohibit circumvention of technologies used by patent-holders to protect against unlicensed use of their patented products.

Congress plainly did not intend for the courts to develop these discrete bodies of law in lock-step, and neither has this Court nor any other federal court of which

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[4] "All administrative functions and duties under this title, except as otherwise specified, are the responsibility of the Register of Copyrights as director of the Copyright Office of the Library of Congress." 17 U.S.C. § 701(a). The Copyright Act's only reference to patents is intended to prevent overlap. 17 U.S.C. § 1329 (issuance of a design patent terminates copyright in the design).

Amici are aware ever adjudicated "intellectual property" generically.

This Court has clearly borrowed principles from patent law to apply in a copyright case, but it has never adjudicated "patent and copyright law" in a case concerning only one of these domains. For example, this Court has referred to principles applicable when a product is "patented or copyrighted," but such references merely recognize that the principle has been applied in both cases. Even in *Loew's*, which is generally cited for the first use of the phrase in relation to tying, this Court recognized that the application of the principle to patents and to copyrights had already developed separately. 371 U.S. at 45-46 (citing a patent case, *International Salt Co. v. United States*, 332 U.S. 392 (1947), and a copyright case, *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948)). Having applied the twin presumptions through separately justiciable cases and controversies, it cannot follow that a single case applicable to one domain should dispose of the matter for the other.

B. Confining any holding in this case to patent cases comports with well-settled principles of justiciability

It is a fixture of appellate practice that an *amicus*, a non-party, cannot "expand the scope of an appeal to implicate issues that have not been presented by the parties to the appeal."[6] Though its operation seems clear

[6] *Eldred v. Reno*, 239 F.3d 372, 378 (D.C. Cir. 2001), *aff'd on other grounds sub nom. Eldred v. Ashcroft*, 537 U.S. 186 (2003). *Eldred* is instructive because the panel majority declined to consider a new copyright issue, grounded in *the preamble* to the Constitution's copyright

(Continued on following page)

here, *Amici* do not press the argument merely to exclude, with procedural cleverness, an otherwise salutary legal position. Instead, the rule, and its evident operation here, reflects much broader principles of justiciability and federalism that warrant vindication in this proceeding.

A federal court decides whether a case or an issue is properly before it – that is, whether it is justiciable – with reference to several doctrines, including standing, ripeness, mootness, and the political question doctrine. These reflect the constitutional limitation that "federal courts may adjudicate only actual, ongoing cases or controversies." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990); *see also* U.S. CONST. art. III, § 2, cl. 1.

The constitutional limitation, in turn, reflects the careful demarcation between the legislative and judicial functions – the latter properly dispatched only through the presentation of concrete factual injuries and claims. "[A] court must rely on the parties' treatment of the facts and claims before it to develop its rules of law. Only concrete injury presents the factual context within which a court, aided by parties who argue within the context, is capable of making decisions." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221 (1974).

The Copyright Industry *Amici* fail this critical predicate for a justiciable issue. Their suggestion on appeal, in a patent case, obviously precludes the requisite factual *adjudication* of any asserted injury that implicates the

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clause, in a case otherwise concerning the Constitution's copyright clause. *See also Knetsch v. United States*, 364 U.S. 361, 370 (1960) (noting that the Court had no reason to pass upon an *amicus* argument not advanced by petitioners).

presumption of market power in a copyright tying dispute. The Court cannot know in this case, for example, what kind of injury the Copyright Industry *Amici* might assert in an actual dispute – or what kind of injury might be asserted against them. The Court cannot know in this case how the presumption of market power may accord with the factual context of an actual copyright tying case, nor obtain a "complete perspective upon the adverse consequences flowing from the specific set of facts" developed in a copyright tying case. *Id.*

In sum, Copyright Industry *Amici* ask this Court to issue a precedent-shattering advisory opinion without any predicate factual context or adjudication. We respectfully request that the Court decline the invitation, and expressly limit any holding to patent law.

II. Material Differences Between Copyrights and Patents Foreclose Treating the Presumption of Market Power As Though Identical Considerations Drive the Presumption in Both Copyright and Patent Cases

Although *Loew's* refers to the presumption of economic power in the case of both patent-tying and copyright-tying, *id.* at 45 and n.4, application of that principle to copyright-tying was both deliberate and based on an analysis of copyright policy itself, *Paramount Pictures*, 334 U.S. at 156-59. The same deliberation should guide any reconsideration of it. Moreover, substantial differences between patents and copyrights render tying analyses of patent markets inapposite to copyright markets.

A. Close market substitutes, common among patented products, are a rarity among copyrighted works

Inherent in the structure of patent protection is the possibility that if one person builds a patented mousetrap, another will build a better mousetrap without infringing the patent. Indeed, the entire basis for patent law is to encourage not only the patented innovation, but also the follow-on innovation intended to create something even better. Patents are intended to result in close market substitutes, each vying for the title of "the best" – a product so good that it can gain market dominance, even a lawful monopoly, on its own merits. But that is not the case for copyrights. It has never been an objective of copyright law to encourage authorship of "the best sonata," "the best movie of all time," or "the best novel" that can satisfy completely – or even for a period of years – the market demand for "sonatas," "movies" or "novels." To the contrary, rather than encouraging substitutes, copyright law encourages the exponential increase in diverse creations offered for cumulative selection from among a cacophony of expressive works of authorship.

Federal courts have recognized this lack of true substitutes. For example, a single television program was found to be "of a unique nature sufficient to give ABC a leverage to gain economic power over the tying product." *American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc.*, 221 F. Supp. 848, 850 (S.D.N.Y. 1963). Economic measures for detecting "price elasticity" fail to capture the fact that market demand to hear The Beatles perform *Here Comes the Sun* will not be satisfied even by listening to a most satisfying rendition of the same song by a different group. (*See, e.g., Here Comes the*

Sun performed by various Cuban musicians on HERE COMES . . . EL SON: SONGS OF THE BEATLES . . . WITH A CUBAN TWIST, Panama Music & Screenworks (2000).) Both may give equal pleasure to the listener, but neither will substitute for the other.

Economists might argue that while it may be true that consumers generally will not flock to *My Dinner With Andre* just because of an increase in the ticket price for *E.T.* (*Syufy Enterprises v. American Multicinema, Inc.*, 793 F.2d 990, 994-95 (9th Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987)), there will be some price at which consumers will no longer consider the expense a good value if other motion pictures have set a lower benchmark. But that is of no legal significance because having watched *My Dinner With Andre*, even if prompted by a bargain price of admission, will not diminish a pre-existing desire to watch *E.T.* Similarly, regardless whether *Getting Gertie's Garter* is tied to *Gone With The Wind*, or vice versa (*Loew's*, 371 U.S. at 48 n.6), whatever independent demand there may have been for either work will not be diminished by virtue of having watched the other. What is more, satisfying demand for the tying *or* tied motion picture will not satisfy demand for any other motion picture, regardless whether they are considered competitive with either of them in economic terms. Thus, while various motion picture studios may compete for the top spot at the box office, or for the largest share of screens or video retailer buying dollars, the consumer choice to see one film over another is merely a reflection of the fact that a person can watch only one movie at a time. It is in the public interest, then, that theaters and video retailers remain free to offer as wide and varied a selection as they can to meet each one's perceived customer demand rather than be tied into

offering the "full line" from one studio to the exclusion of other selections that could have been offered, and that might have been more popular with the merchant's customer base.[6]

The difference between patent markets and copyright markets in terms of market substitutes is obvious: Desirable movies passed over on Friday night will remain desirable on Saturday morning regardless how satisfying the Friday night movie experience may have been. But the desirable mousetrap passed over in favor of another is no longer in competition for that mousetrap consumer.

B. Copyrights confer inherently broader market power than do patents

Some conclude, wrongly, that the U.S. Code makes patents superior, such as by granting an exclusive right to "use" the patented invention – a right missing from copyright law.[7] The true measure of the economic power is not in the scope of rights, but in the effect of those rights. For that measure, one need only consider what economic power the author or inventor would have in the absence of patent or copyright protection.

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[6] The *Loew's* Court made particularized observations with respect to copyrights. For example, it observed: "the distinctiveness of the copyrighted tied product is not inconsistent with the fact of competition, in the form of other programming material and other films, which is suppressed by the tying arrangements." 371 U.S. at 49.

[7] For example, it is never copyright infringement to perform a work privately, even if the performance is made from a stolen or infringing copy. Similarly, it is not copyright infringement to sneak into a theater without paying, regardless whether the theatrical performance was infringing.

Without patent protection, the inventor of a device or method may nevertheless achieve market dominance as against imitators. If the manufacturer has a better brand image, produces a better quality product, offers more competitive prices, has the most efficient manufacturing and distribution facilities, or enjoys superior goodwill among merchants, market dominance and even a monopoly may be achieved without the aid of a patent. The same is not true for copyrights.

Without copyright protection, it would be virtually impossible to develop any economic power in a work no matter how skilled or efficient the copyright owner may be – particularly today, when digital technology makes it economical for millions of people to reproduce or perform publicly any literary, musical or audiovisual work created by another. Absent the exclusive rights conferred by copyright, the author of a motion picture could never hope to derive any greater market share than anyone else, save perhaps at the moment of first publication, and would be powerless to affect the price or the supply of copies or public performances of the work. Perfect market substitutes would be available within a few seconds and a few "clicks" of a computer input device.

Derivative works – perhaps the closest market substitute for a copyrighted work after an exact reproduction – would flourish as other authors seek to improve upon or add new features to the original work. The only obstacle to creation of close or perfect market substitutes for a copyrighted work is the copyright itself. The competitive threat from one who produces a replica of a patented car will be far less than from one who reproduces a copyrighted photograph of a car. Accordingly, it is fair to conclude that

the lack of market substitutes derives entirely from the copyright, which alone bars competitive reproductions.

C. Patented inventions may comprise only a small part of the tying product, whereas copyrights are their heart

Successful patent tying may not owe its effectiveness to the strength of the patented invention embodied in the product but to the strength of the commodity itself. That is, a commodity embodying a patented invention may have substantially the same value even after the patented feature is removed. *Cf. U.S. Philips Corp. v. ITC*, No. 04-1361, 2005 U.S. App. LEXIS 20202 (Fed. Cir. Sept. 21, 2005) (unwanted non-essential patents added to patent pool at no additional cost). In the case of copyrights, in contrast, it is rare that the market value of the tangible medium in which the work is embodied will retain its value when it is no longer a "copy" (as defined in 17 U.S.C. § 101). If the motion picture is removed from a DVD or a reel of film, or the work itself is otherwise rendered inaccessible, the product essentially loses all of its value.

The "market" for a copyrighted work is derived from the expression itself – either in the licensing of the work to perform it publicly or to reproduce it into copies, or by the sale of copies. For example, when a theater obtains the right to perform the work publicly, the medium from which the performance is made – reels of film, digital copies, or even streaming – is virtually irrelevant. And although a consumer may prefer the medium of DVD to VHS cassette, it must still be a DVD or VHS "of the particular movie" to have any value to the viewer. The medium containing the copyrighted work is not the market – the "copy of the work" is the market. In the case of a patented movie

projector, in contrast, the object of the purchase is the projector itself, and not the particular patented inventions contained therein.

D. The impact on competition in the tied product's market is greatest when tying is achieved through copyright

A classic example of patent tying involves tying a product used *in conjunction with* the patented product. Be it tying copyrighted films to the patented film projector (*Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502 (1917)), salt tablets to a patented machine for depositing them (*Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488 (1942)), or replacement parts and services to a patented device (*Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451 (1992)), there is a plausible argument that the tie may, under the right set of facts, provide countervailing benefits. *See, e.g., Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 514 n.9 (1969) (White, J., dissenting). These considerations do not apply to copyright leveraging, which reaches well beyond the copyrighted work. It does not enhance the functionality or consumer value in the tying product at all. The sole function of the tie is to require prospective purchasers of copies or licenses to choose the tied product over other options (or to give up nonexclusive rights), not because of any added value resulting from the tie, but because of the strength of the tying product to force that choice.

Classic copyright tying cases show no "value added" for the tying product, the tied product or the bundle. (Consumer response to the bundle offered as a competitive *option* is proof enough of its value, or lack thereof.) The only added value to the tied product is from the surplus

value of the tying product used to force acceptance of the undesired tied product, or acceptance of less favorable terms. *See, e.g., Paramount Pictures,* 334 U.S. 131 (leveraging the public performance license in a desired copyrighted work to sell performance licenses for less desirable works), *Loew's*, 371 U.S. 38 (1962) (same); *MCA Television Ltd. v. Public Interest Corp.*, 171 F.3d 1265 (11th Cir. 1999) (*expanding* the *Loew's* principle to address leveraging the license to perform the desired copyrighted work to gain better financial terms in the licensing of a separate work *also desired*).

Building on this Court's example in *Loew's*, 371 U.S. at 48 n.6, though there may be a limit to how much even a monopoly market will allow for a license to publicly perform *Gone With The Wind* (or for a ticket to be charged by the licensee for a place in the audience), tying to it a less desirable film like *Getting Gertie's Garter* adds nothing to the quality of *Gone With The Wind*, provides no better consumer experience when watching it, and instills in *Gone With The Wind* no greater literary, artistic, or any other public benefit contemplated by the copyright clause of the Constitution. In like manner, the literary or artistic quality of *Getting Gertie's Garter* is not improved.

In short, leveraging a *patented* product arguably may not impact the market for the tied product. Leveraging a *copyrighted* work such as through block-booking or line-forcing, in contrast, forecloses the option of weighing the relative merits of dedicating a screen, shelf space, or investment dollars in the tied work compared to other works competing for screens, shelf space, or dollars.

E. Copyright industries are uniquely positioned for "class leverage" and "hit leverage"

Patent-tying cases typically involve a single patented product used for tying. The patentee might market few products other than the tying one, and the tie is generally intended to reach only a market relating to the tied product itself. Copyright-tying cases, in contrast, typically involve a "practice" of tying that goes beyond any specific copyrighted work used as the tying product, and just as typically involve tying other works owned by the same company. The phenomena of "class-tying" and "hit-tying" are unique to copyright and have greater impact than the sum of the individual works.

Class leverage. Even where no specific work is involved in the tie, the most desired works (referred to in the motion picture and home video industries as "the 'A' titles") may, as a class, be leveraged into greater economic power in the less desirable "'B' movies" by the same copyright owner. *See, e.g., Syufy Enterprises*, 793 F.2d at 994-95 (jury could reasonably have concluded that "the industry anticipated top-grossing films were not in substantial competition with other films," *id.* at 995). Large enterprises that continually acquire or produce a variety of copyrighted works anticipate which ones will be the most desirable or just marginal, and can, if given rein, tie one class to another (such as in full-line forcing). The buyer of a particular company's products might be willing to pass on an individual tying work, but cannot reasonably pass on an entire "A" list of titles from that company.

Hit leverage. Copyright Industry *Amici* acknowledge that some of their works may be strong enough to confer market power, but insist that they represent too small a

percentage of the total to be of any significance. Brief of Copyright Industry *Amici* at 28. This observation misses the "hit-tying" power evident in the entertainment industry. Whether a particular work itself is of lasting stature, such as *Gone With The Wind*, or is simply one of the latest box office hits that will be forgotten by the following summer, the entertainment industry remains a hit-driven industry in which retailers and theatrical exhibitors must have available a core selection of the "hit" films just to remain competitively viable. A major copyright holding company would always have a "hit" or two available to drive the lesser films at any given moment, if tying were permitted.

F. Disparate terms of exclusive rights yield different economic consequences

A patent is granted for a term of 20 years. 35 U.S.C. § 154(a)(2). Copyright terms are for the life of the author plus 70 years (17 U.S.C. § 302(a)), or in the case of anonymous works or works for hire, 95 years from publication (17 U.S.C. § 302(c)). The patents that average people see come into being during childhood will come to an end during the prime of their lives. The copyrights that average people see come into being during childhood will likely remain copyrighted for the remainder of their lives. Thus, in terms of the economic impact on human lives, an economist's calculation that a patent tie will cease to exist once the patent is lost is meaningless when applied to copyrights.

III. The Purposes Of Patent And Copyright Law Differ Dramatically In Relation To Non-Economic Factors

Economists critical of the presumption of economic power for tying patents explain the potential value of various tying arrangements in purely economic terms. That perspective has limited bearing on the main public policy aim of copyright law. "Because copyright law ultimately serves the purpose of *enriching the general public through access* to creative works, it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994) (emphasis added).

A. The exclusive rights are different

The patentee is given the exclusive right to "use" the patented invention, 35 U.S.C. § 271(a), and the patent can be enforced against anyone owning the patented product. Copyright law, in contrast, is replete with restrictions against the copyright holder, limiting the exclusive rights to a very narrow set of uses. Very few rights extend to the product embodying the copyrighted work. The Copyright Act draws a sharp distinction between the rights in the copyright and the rights in the copy, 17 U.S.C. § 202, and the *only* right granted to copyright owners over the tangible non-infringing copy of a motion picture survives only so long as the copyright owner owns it. 17 U.S.C. § 109(a). Similarly, the right to perform a work publicly does not extend so far as to control who can join the audience for the performance.

All copyrights are established as inferior – "subject to" – the rights reserved by law to nonexclusive use of the

public. 17 U.S.C. § 106.[a] But it is incorrect to conclude that these limitations make copyrights "weaker" than patents (such that whatever rules apply to patent law may as well apply to copyright law without further thought). The reverse is true. Because patents are so broad, they leave relatively little "use" beyond the exclusive control of the patentee. The realm in which the tying mischief can be exercised is much smaller. Indeed, the tie may be used as leverage to enhance the value of the tying product more readily than to undo the limitations on the patent itself.

Copyright law, in contrast, contains limitations inherent in the copyright grant. Some are statutory, while the First Amendment requires others. *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) ("copyright law contains built-in First Amendment accommodations").[b] Consequently, ties

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[a] "[T]he definition of exclusive rights in § 106 . . . is prefaced by the words 'subject to sections 107 through [122].'" *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 447 (1984) (emphasis added); *accord* H.R. Rep. No. 94-1476, at 61 (1976) ("[E]verything in section 106 is made 'subject to sections 107 through [122]' and must be read in conjunction with those provisions.").

[b] This Court has called for keen awareness of the special "power of evil" in the wielding of economic power to restrain freedom of speech. Although *Motion Picture Patents Co.*, 243 U.S. 502, is generally viewed as a patent-tying case (the tying product was a patented film projector), the Court was particularly troubled by the fact that the tied products were expressive materials:

> A restriction which would give to the plaintiff such a potential power for evil over an industry which must be recognized as an important element in the amusement life of the nation . . . is plainly void, because wholly without the scope and purpose of our patent laws *and because, if sustained, it would be gravely injurious to that public interest,* which we have seen is more a favorite of the law than is the promotion of private fortunes.

(Continued on following page)

in copyright cases are more likely to be used both as a tool for increasing demand for the tied product *and* for casting off the limitations Congress and the Constitution have imposed. This is particularly true in this "digital" era in which technological measures can be used to suppress competition.

To give but one example, the copyright owner who conditions the sale of a motion picture on the buyer's agreement to waive Section 109 rights eliminates competition in the secondary market for the same work. Economists may attempt to "measure" the impact on competition in the used, gift and rental markets, and they may well conclude that one publisher is more competitive vis-à-vis another publisher because its higher profits in the primary market will offset the loss of original sales that supply the secondary market. Such cold economic calculus cannot, however, quantify the losses to the individuals that depend upon secondary markets for copyrighted works as much as they do secondary markets for shoes and clothing. And, it is not just economic loss that these less fortunate suffer. Their loss is measured in impairment of the very constitutional basis for the copyright grant – to advance the progress of science and art.

Id. at 519 (emphasis added). Clearly, the analysis went well beyond the kind of narrow focus on economic theory being urged upon the Court in this case.

B. This Court's precedents draw more on fundamental principles of copyright law than on pure economic analysis

Loew's and the "long line" of cases relied upon by this Court in *Loew's*, 371 U.S. at 45-46, relied little on the "market power" concepts that have developed in tying cases not involving patents or copyrights. Rather, they relied on a more basic principle – one in common with much of the "misuse" jurisprudence: that when exclusive rights are granted by law (regardless of the economic value of those rights), any leveraging of the exclusive rights granted to gain power, influence or control over matters resting beyond the exclusive rights are just as odious to antitrust law as had the monopoly been unlawfully acquired.

Thus, this Court's jurisprudence reveals not so much the hurried and untested creation of a presumption of market power, as critics contend, as a realization that proof of any market power is largely unnecessary when tying of copyrights is involved. Whether publishers of economically valuable motion pictures with a large market share engage in block-booking that forecloses access by smaller filmmakers to a theater's screens, or whether a budding new filmmaker distributes its single little-known motion picture on a DVD only to buyers who agree to give up their right under law to lend, rent or resell it (and thus destroy competition from the secondary markets for that single, economically insignificant title), the antitrust injury is identical in all respects but degree. The injury lies not in questions of measurable injury to competition so much as in the fact that Congress said, "You may have these rights, but no more," and the grantee took those granted rights and leveraged them to obtain on the open

market the rights denied by Congress.[10] That is, the limited rights are leveraged to circumvent the limits.

But are patents and copyrights the same in this regard? Perhaps one meritorious argument against applying the presumption in a patent-tying case is this: In some cases, what can be fairly said to be leveraged by the tie is not the patent or a "patented product," as such, but an ordinary commodity that happens to have a patented invention embodied in it. Such argument, when applied to copyrights, is untenable. Under copyright law, the tying product will always be either a license for the "bare" right, such as the right to perform publicly an audiovisual work, or it will be a "copy or phonorecord," which are defined as a material object embodying the copyrighted work.

The observations in this section demonstrate that patents are more likely to fuel competition consistent with patent law, given that the reward to the innovator is intended to drive the desire to "build a *better* mousetrap." Within the market for ink and printing devices, the selection of the single "best" invention will satisfy the consumer to the exclusion of the runners up. Copyright protection, in contrast, is not intended to fuel any competitive advantage against other works because copyright law encourages *diversity* and *multiplicity* of expression. Copyright protection is limited to protecting certain types of

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[10] The first four lines of the poem *Lester*, by Shel Silverstein, express a logic against leveraging limited rights into unlimited ones that even a child can understand:

> Lester was given a magic wish
> By the goblin who lives in the banyan tree,
> And with his wish he wished for two more wishes –
> So now instead of just one wish, he cleverly had three.

exploitation of the individual copyrighted work, and no more, *without* excluding other works.

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully request that if this honorable Court chooses to relax the application of the *Loew's* principle in patent-tying cases, it should make clear that the presumption's continued viability in copyright-tying cases remains untarnished.

Respectfully submitted,

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